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IN THE

Supreme Court of the United States

October Term, 1982

JOHN R. DEVITO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Statutes Involved

New York State Penal Law, Section 65.00(1):

"(b) The court, with the concurrence of either the administrative judge of the court or of the judicial district within which the court is situated or such administrative judge as the presiding justice of the appropriate appellate division shall designate, may sentence a person to a period of probation upon conviction of a class A-II felony or a class B felony defined in article two hundred twenty if the prosecutor either orally on the record or in a writing filed with the indictment rec-

ommends that the court sentence such a person to a period of probation upon the ground that such person has or is providing material assistance in the investigation, apprehension or prosecution of any person for a felony defined in article two hundred twenty or the attempt or the conspiracy to commit any such felony, and if the court, having regard to the nature and circumstances of the crime and to the history, character and condition of the defendant is of the opinion that:

(i) Institutional confinement of the defendant is not necessary for the protection of the public;

(ii) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision;

(iii) The defendant has or is providing material assistance in the investigation, apprehension or prosecution of a person for a felony defined in article two hundred twenty or the attempt or conspiracy to commit any such felony; and

(iv) Such disposition is not inconsistent with the ends of justice."

* * *

New York State Penal Law, Section 70.40:

"1. Indeterminate sentence.

(a) A person who is serving one or more than one indeterminate sentence of imprisonment may be paroled from the institution in which he is confined at any time after the expiration of the minimum or the aggregate minimum period of imprisonment of the sentence or sentences. Release on parole shall be in the discretion of the state board of parole, and such person shall continue service of his sentence or sentences while on parole, in accordance with and subject to the provisions of the executive law.

(b) A person who is serving one or more than one indeterminate sentence of imprisonment shall, if he so requests, be conditionally released from the institution in which he is confined when the total good behavior time allowed to him, pursuant to the provisions of the correction law, is equal to the unserved portion of his maximum or aggregate maximum term. The conditions of release shall be such as may be imposed by the state board of parole in accordance with the provisions of the executive law.

Every person so released shall be under the supervision of the state board of parole for a period equal to the unserved portion of the maximum or aggregate maximum term."

New York State Criminal Procedure Law, Section 410.90:

"2. The court may terminate a period of probation for a person who is subject to lifetime probation and has been on unrevoked probation for at least five consecutive years."

Statement of Case

The petitioner was charged on one indictment, embracing eleven counts, relating to five separate drug sales made to undercover police officers.

According to the prosecution's theory of the case, the petitioner was the principal supplier of methamphetamine ("speed") to a ring of drug sellers under the leadership of Stephen DiLauro. During the period of August 1, 1978 and August 18, 1978, the petitioner, DiLauro and three others similarly charged, conspired in numerous drug sales

culminating in the largest and most profitable sale on August 18, 1978.

The prosecution charged that the petitioner and his cohorts joined together in furtherance of the five sales, and in particular, the sale of August 18, 1978. Liability for the substantive sale and possession counts was predicated on the appellant's knowledge that the drugs he supplied were earmarked for specific sales.

According to the defense theory, not only was the petitioner unaware of any specific sale of drugs, he was unwittingly drawn into the conspiracy vis-a-vis his relationship with the real drug supplier, Salvatore Abbate.

The petitioner moved to suppress any evidence obtained from a wiretap of Stephen DiLauro's telephone pursuant to court order. This motion was denied in its entirety, however, on inspection of the Grand Jury minutes. Nisi prius dismissed counts two through five of the indictment and upon a re-reading of the minutes dismissed counts eight and nine. The remaining counts: one, six, seven, ten and eleven were preserved for trial.

At the end of the prosecution's case-in-chief, counts six and seven of the indictment were also dismissed when the prosecutor failed to establish a prima facie case of the petitioner's active participation in the sale of August 16, 1978.

Count eleven of the indictment was withheld from the jury on consent of the prosecutor and defense counsel.

The petitioner was convicted on count one of the indictment of conspiracy in the first degree, a class B felony under the Penal Law of New York State, and on count ten of criminal sale of a controlled substance in the second degree, a class A-II felony.

He was sentenced to an indeterminate term of incarceration of three years to life on the sale conviction to be served concurrently with a sentence of zero to three years on the conspiracy count.

The judgment of conviction entered on March 20, 1980 was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department and by the Court of Appeals of the State of New York.

Reasons for Denying the Writ

POINT I

A mandatory life sentence with the possibility of parole after three years does not offend the Eighth and Fourteenth Amendment proscription of cruel and unusual punishments.

The Court has recently taken a severely restricted view of the proportionality principle [e.g., *Coker* v. *Georgia*, 433 U.S. 584 (1977); *Weems* v. *United States*, 217 U.S. 349 (1910)] wherein successful challenges to the proportionality of particular sentences outside the context of capital punishment should be exceedingly rare, and federal courts should be reluctant to review legislatively mandated terms

of imprisonment. *Rummel* v. *Estelle*, 445 U.S. 263 (1980); *Hutto* v. *Davis*, 454 U.S. 370 (1982).

Concededly, the disparity of punishment between co-defendants similarly charged may appear disproportionate, however a proper assessment of New York's treatment of petitioner could hardly ignore the probability that he will not actually be imprisoned for the rest of his life. N.Y. Penal Law §70.40(1). This alone, if nothing else, should serve to distinguish this case from those imposing a life sentence without possibility of parole.[1] See, e.g., *Helm* v. *Solem*, —— F.2d ——, 31 Cr.L.Rep. 1082-83 (8th Cir. 1982).

Simply stated, the disparity of sentences in the instant case do not suffer from a great degree of disproportionality in painful excess to the punishments by the New York Courts on other defendants convicted of similar offenses. See N.Y. Penal Law Art. 220.

POINT II

The petitioner was not denied his Sixth Amendment right of effective cross-examination under the state of the testimony in this case.

Since it is not possible that the conviction of the appellant could stand without the testimony of co-defendant Jacqueline DiLauro, admittedly, her credibility was a critical issue in this case. However, in context and light of the

1. Indeed, under certain circumstances a court with the concurrence of the administrative judge may, upon recommendation of a prosecutor, sentence a person convicted of a class A-II Article 220 felony to lifetime probation in lieu of imprisonment. N.Y. Penal Law §65.00(1)(b). Such sentence can be terminated by the court after five years. N.Y. Criminal Procedure Law §410.90(2).

indictment having been dismissed against the witness and her testimony compelled by a grant of immunity, cross-examination was properly limited by the trial judge.

No door has been opened to the inquiry and it was not necessary to specify the potential sentence in order to explain to the jury the extent of the arrangement the witness had made with the prosecutor for a grant of immunity. Cross-examination that was permitted defense counsel was adequate to develop the issue of bias to the jury. Cf. *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974).

POINT III

The isolated remarks of the trial court did not serve to discredit the defense in the eyes of the jury nor did they exceed the confines of judicial propriety.

Both as to form and substance, the court properly sought to frustrate defense counsel's inquiry on the scope of punishment faced by the prosecution witness. While the court should have refrained from any remark directed at the counsel's integrity in the making of the inquiry, this is clearly not a case of a judge forcing on the jury his own opinion as to the defendant's guilt, one where by repeated comments he actually assumes the falsity of the defense or posed the threat of cumulative adverse affect on the defendant's position. Cf. *United States* v. *Guglielmini*, 384 F.2d 602, *appeal after remand* 425 U.S. 439, *cert. den.* 400 U.S. 820 (1970). Furthermore, when the judge's statements are viewed in connection with the entire record, they are not of such significance as to have seriously impaired any substantial right of the defendant. See, *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963).

Conclusion

Upon the foregoing this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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